

# Federal Labor Laws

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## **XIX. Bargaining over Unilateral Changes in Conditions of Work, including Basic Capital Decisions and their Effects**

### **A. Management's Right to Change Conditions of Work Unilaterally**

1. In the absence of an organizing campaign or bargaining relationship, management has the right to implement any changes in terms and conditions of work, which do not contravene other legal limitations.
  - a. The basic power of the employer over conditions of work was articulated succinctly by the Third Circuit Court of Appeals in its famous observation that an employer may fire a person for a good reason, a bad reason, or no reason at all, as long as the reason is not an illegal one.<sup>1</sup>
  - b. The broad area of employment law also imposes restrictions over managerial action. Employment legislation includes such laws as the Fair Labor Standards Act, the Occupational Safety and Health Act, various Equal Employment Opportunities Acts, etc.
2. Prior to certification of a union as a bargaining agent, the right of management to change conditions of work is limited by the unfair labor practices of the National Labor Relations Act. For example, management may not take unilateral action that improperly interferes with workers exercising their statutory rights or which is intended to discourage unionization.<sup>2</sup>
3. During a Board election campaign, but prior to union certification, the employer is further prevented from implementing change unilaterally. Unilateral changes that interfere with the ability of the Board to conduct a fair election may be objectionable, even if those changes do not constitute an unfair labor practice.

### **B. The Duty to Bargain over Unilateral Changes**

1. Immediately upon establishment of a bargaining relationship, the employer is restricted in its ability to implement changes in the terms and conditions of employment.

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<sup>1</sup> *NLRB v. Condenser Corp.*, 128 F.2d 67 (3d Cir. 1942).

<sup>2</sup> *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964).

2. As soon as the union becomes the bargaining agent and has requested bargaining, the employer is prohibited from unilaterally changing terms or conditions of employment without first negotiating with the union.<sup>3</sup>
3. The restriction applies to changes in matters that would constitute mandatory subjects of bargaining or matters that would vitally affect the terms and conditions of bargaining unit members.
4. The obligation of the employer is to bargain to the point of impasse prior to implementing any changes in conditions of employment unilaterally. In formal negotiations, the parties must reach overall impasse on bargaining for the agreement as a whole.<sup>4</sup> However, impasse may be based on a single, critical issue, if an impasse issue is sufficient to cause a breakdown in the entire negotiations.<sup>5</sup>
5. One Court of Appeals has rejected the basic rule of the National Labor Relations Board. The Fifth Circuit would allow an employer to unilaterally change conditions of employment without reaching impasse. Under this court's interpretation, the only obligation of the employer is to notify the union of its intent to implement a change and to give the union an opportunity to respond. The Board has refused to adopt this standard.<sup>6</sup>
6. There are a few narrow exceptions to the general rules limiting management implementation of unilateral changes. Under the *Bottom Line* test, an employer may implement changes unilaterally without reaching impasse if the lack of impasse is the direct result of delaying tactics of the union or in cases of economic exigencies compel prompt action.<sup>7</sup>
  - a. The burden is on the employer to show that the change was necessitated by economic exigencies. Moreover, the emergency must be one that is beyond the employer's control, was caused by external events, or was not foreseeable.<sup>8</sup>

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<sup>3</sup> *NLRB v. Katz*, 369 U.S. 736 (1962).

<sup>4</sup> *RBE Electronics*, 320 NLRB 80 (1995). See, also, *Register-Guard*, 339 NLRB 353 (2003).

<sup>5</sup> *CalMat Co.*, 331 NLRB 1084 (2000).

<sup>6</sup> *NLRB v. Pinkston-Hollar Construction Services*, 954 F.2d 306 (5<sup>th</sup> Cir. 1992), on remand, *Pinkston Hollar Construction Services*, 312 NLRB 1004 (1993).

<sup>7</sup> *Bottom Line Enterprises*, 302 NLRB 373 (1994). Compare, *Harmon Auto Glass*, 352 NLRB No. 24 (2008)(no financial exigency) with, *Post Printing and Specialty*, 351 NLRB No. 91 (2007)(financial exigency).

<sup>8</sup> *RBE Electronics*, note 4, *supra*.

- b. In an economic exigency situation, the employer must still notify the union of the proposed changes and provide an opportunity to negotiate.
7. Impasse is broadly defined as that point at which further negotiations would be futile.<sup>9</sup> An impasse is a temporary suspension of the duty to bargain. The duty to bargain remains in effect, but only when a change in circumstances creates a realistic opportunity for further, constructive negotiations.<sup>10</sup>
- a. In determining whether an impasse exists, five major factors are considered: (1) the bargaining history of the parties, (2) the extent to which the parties have bargaining in good faith, (3) the length of the negotiations, (4) the importance of the issues, and (5) the understanding of the parties concerning the status of negotiations.<sup>11</sup>
  - b. Unremedied unfair labor practices may prevent a determination that impasse has been reached. Such unfair labor practices may affect the ability to reach agreement either by increasing the level of friction at the table or by changing the baseline for negotiations.<sup>12</sup> However, there must be a significant causal connection between the unfair labor practices and the impasse.<sup>13</sup>
  - c. If there are pending unfair labor practice charges concerning requests for information relevant to the issues in dispute, the parties will not be deemed at impasse.<sup>14</sup>
8. After reaching impasse, the employer is free to implement the change, but only to the extent that the changes made are consistent with the company's final position in negotiations.<sup>15</sup>
9. Even if impasse is reached, an employer may be prevented from implementing a change unilaterally if the specific change is

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<sup>9</sup> *Hayward Dodge, Inc.*, 292 NLRB 434 (1989).

<sup>10</sup> *Serramonte Service Plaza v. NLRB*, 86 F.3d 227 (D.C. Cir. 1996).

<sup>11</sup> *Intermountain Rural Electric Assoc. v. NLRB*, 984 F.2d 1562 (10<sup>th</sup> Cir. 1993). See, also, *Grinnell Fire Protection Systems v. NLRB*, 236 F.3d 187 (4<sup>th</sup> Cir. 2000). Compare, *Richmond Electrical Services*, 348 NLRB No. 62 (2006)(no impasse), with *Coastal Cargo Co.*, 348 NLRB No. 32 (2006)(impasse).

<sup>12</sup> *Titan Tire Corp.*, 333 NLRB 1156 (2001), *Alwin Mfg. Co.*, 326 NLRB 646 (1998).

<sup>13</sup> *Washoe Medical Center*, 348 NLRB No. 22 (2006).

<sup>14</sup> *E.I. DuPont deMours & Co. v. NLRB*, 489 F.3d 1310 (D.C. Cir. 2007); *Sierra Bullets, LLC*, 340 NLRB No. 40 (2003), *Decker Coal*, 301 NLRB 729 (1991).

<sup>15</sup> See, e.g., *NLRB v. U.S. Sonics Corp.*, 312 F.2d 610 (1st Cir. 1963).

inherently destructive of the fundamental principles of collective bargaining. For example, a proposal for a merit pay system that gives the employer unlimited control over the timing, amount, and standards for determining raises would make meaningful bargaining over future wages impossible. Such a merit pay system would amount to a right of the employer to make recurring unilateral changes without bargaining.<sup>16</sup>

10. At the expiration of a collective bargaining agreement, the presumption is that existing conditions of employment remain in effect. Expiration of the existing contract does not give the employer the right to change the terms identified in that contract.<sup>17</sup> However, there are a few exceptions.
  - a. Arbitration clauses are contract-dependent. No party to a dispute can be forced to submit that dispute to arbitration in the absence of an agreement. Therefore, the arbitration provisions of a collective bargaining agreement do not continue in effect at the expiration of the contract.<sup>18</sup>
  - b. Union security provisions cease to be enforceable at the expiration of a collective bargaining agreement. These provisions are also considered to be contract-dependent.<sup>19</sup>
  - c. A no-strike agreement also ceases to be enforceable at the expiration of a collective bargaining agreement. The right to strike is a statutory right that will not be waived without a bilateral contract.<sup>20</sup>
  - d. A management rights clause also does not survive the expiration of a collective bargaining agreement.<sup>21</sup>
11. At the expiration of a collective bargaining agreement, if the union goes on strike, the employer has the right to hire replacement workers. The employer may also set the initial terms and conditions of the striker replacements unilaterally. This is considered to be an interim change in conditions. The unilaterally imposed conditions will apply to the replacements only as replacements. If they retain

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<sup>16</sup> *McClatchy Newspapers*, 321 NLRB 1386 (1996).

<sup>17</sup> *Daily News of Los Angeles*, 315 NLRB 1236 (1994).

<sup>18</sup> *Litton Financial Printing Division v. NLRB*, 501 U.S. 190 (1991).

<sup>19</sup> *Bethlehem Steel Co.*, 136 NLRB 1500 (1962).

<sup>20</sup> *Southwestern Steel & Supply v. NLRB*, 806 F.2d 1111 (D.C. Cir. 1986).

<sup>21</sup> *University of Pittsburgh Medical Center*, 325 NLRB 443 (1998).

their jobs at the conclusion of the strike, they would become part of the bargaining unit and would be paid accordingly.<sup>22</sup>

### C. Unilateral Changes during the Life of a Contract

1. During the life of the contract, the employer may implement only those changes that the contract and the intent of the negotiations allow.
2. If an employer acts in a manner consistent with the contract, there is no additional duty to bargain prior to making the change. This is technically not unilateral change because the union has already agreed to allow the company to act.
3. More difficult issues arise when the contract is silent about management's right to act unilaterally.
  - a. The general rule is that the duty to bargain over mandatory subjects of bargaining is a continuing duty even during the life of the contract.<sup>23</sup> If the contract is silent on a subject, the subject remains negotiable.<sup>24</sup> However, this is a rule that probably has more exceptions than applications.
  - b. The right to bargain may be waived either by specific contract language or by the past behavior of the parties. Although a waiver of statutory rights must normally be clear and unmistakable,<sup>25</sup> the Board recognizes several distinct theories of waiver of the right to bargain during the life of a contract.
    - 1) Waiver through failure at the table: If a proposal to limit management's rights is made during negotiations, extensive discussion of the limitation occurs, and the union accepts a contract without the limitation, the union will be prevented from bargaining over that type of change during the life of the contract.<sup>26</sup> The same form of waiver applies to the employer. If the employer attempts diligently to obtain a specific right in negotiations and fails, it will be prevented from taking that right unilaterally during the life of the contract.

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<sup>22</sup> *Service Electric*, 281 NLRB 633 (1986).

<sup>23</sup> See, *NLRB v. Jacobs Manufacturing Co.*, 196 F.2d 680 (2<sup>nd</sup> Cir. 1952).

<sup>24</sup> *Tide Water Associated Oil Co.*, 85 NLRB 1096 (1949).

<sup>25</sup> *Johnson-Bateman Co.*, 295 NLRB 180 (1989). For a good discussion of case precedent concerning the waiver issue, see, *Provena St. Joseph Medical Center*, 350 NLRB No. 64 (2007).

<sup>26</sup> *Rockwell International Corp.*, 260 NLRB 1346 (1983), *Proctor Mfg. Corp.*, 131 NLRB 1166 (1961).

- 2) Waiver through inaction or past practice: If the union has consistently allowed management to implement the kind of changes involved without prior negotiations, the union will not be able to challenge specific incidents of such action during the contract term.<sup>27</sup> Of course, past practices may also limit management's right to act unilaterally.<sup>28</sup>
- 3) Negotiation of a "zipper" clause: Parties may include a clause in the contract that states that the right to negotiate additional items not addressed in the contract is waived.<sup>29</sup> While such zipper clauses must be reasonably related to the specific activity contemplated, they may constitute an effective waiver of the right to negotiate, particularly when interpreted in light of the residual theory of management rights.<sup>30</sup>
- 4) Scope of a management rights clause: If an action of management falls within the scope of a negotiated management right's clause, taking action under that clause may not be considered unilateral action. However, the language of the clause must be reasonably specific to constitute a waiver of the union's right to bargain.<sup>31</sup>

#### **D. Bargaining over Basic Capital Decisions and their Effects**

1. The Supreme Court decision in *Textile Workers Union v. Darlington Manufacturing Co.*<sup>32</sup> is important as a starting point for analysis of management's obligation to negotiate with a union over the decision to close all or part of a plant and over the effects of that decision.
  - a. In the *Darlington* case, the Supreme Court recognized management's right to go out of business completely for any reason, even if the decision is motivated solely by anti-union reasons.

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<sup>27</sup> See, e.g., *American Diamond Tool*, 306 NLRB 570 (1992), *Associated Milk Producers*, 300 NLRB 561 (1990).

<sup>28</sup> See, e.g., *Southwestern Portland Cement Co.*, 303 NLRB 473 (1991).

<sup>29</sup> E.g., *TCL of New York*, 301 NLRB 822 (1991), but a "zipper clause" cannot waive a statutory right, see *Gannett Rochester Newspapers v. NLRB*, 988 F.2d 198 (D.C. Cir. 1993).

<sup>30</sup> *GTE Automatic Electric, Inc.*, 261 NLRB 1491 (1982).

<sup>31</sup> Compare, *Baptist Hospital of Eastern Tennessee*, 351 NLRB No. 12 (2007)(finding a waiver) with *California Offset Printers, Inc.*, 349 NLRB No. 71 (2007)(no waiver).

<sup>32</sup> *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 2638 (1965).

- b. Under *Darlington*, partial shutdowns may violate Section 8(a)(3) if the decision was motivated by anti-union reasons.
  - c. Although the *Darlington* case did not address the duty of the employer to negotiate with the union prior to making a plant closing decision, the Court's reasoning later became important as the Board and courts attempted to resolve the duty to bargain over major decisions affecting the future of bargaining unit work.
2. The subcontracting of bargaining unit work was addressed in a 1964 Supreme Court decision, *Fibreboard Paper Products, Inc. v. NLRB*.<sup>33</sup> The Court ruled that the employer was required to negotiate the decision to subcontract that work.
- a. The Court based its ruling on the unique facts of the case, leaving open the question of the duty to bargain over different types of capital decisions.
  - b. In *Fibreboard*, the decision was to subcontract plant maintenance work. Bargaining unit workers were replaced by employees of the outside contractor to do work in the plant among other members of the bargaining unit.
  - c. The Court applied a balancing test to determine the extent to which the employer was obligated to bargain over the decision or effects, weighing management's right to manage with the union's interest in job security and working conditions.
  - d. In subcontracting cases, the Board has required the employer to bargain over decisions to contract out the work as long as there is a direct and substantial impact on the job security of the members. However, if the impact on the bargaining unit is minimal or if the union has allowed the practice to occur on a regular basis, there is no duty to bargain. Factors to consider include the nature of the work, who is performing the work, where it is to be performed and related issues. It is not necessary to show that bargaining unit members will be laid off as a result of the subcontracting decision.<sup>34</sup>
3. In cases following *Fibreboard*, the decisions of the Board in capital decision cases attempted to distinguish between basic capital decisions which involved the "scope and ultimate direction" of the business and lesser decisions tied more directly to the wages and working conditions of workers.

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<sup>33</sup> *Fibreboard Paper Products, Inc. v. NLRB*, 379 U.S. 203 (1964).

<sup>34</sup> *Torrington Industries*, 307 NLRB 809 (1992).

- a. In basic capital decision cases, management was given the right to act without prior negotiations over the decision. The duty to bargain extended only to the effects of that decision on the bargaining unit.<sup>35</sup>
  - b. In other cases, the Board took a more liberal view of the duty to bargain, suggesting that in many cases, termination of bargaining unit work was a mandatory subject of bargaining with the interest of the union in bargaining outweighing the interest of the employer in making the particular decision unilaterally.<sup>36</sup>
4. The Supreme Court again addressed the duty to bargain over basic capital decisions in *First National Maintenance Corp. v. NLRB*.<sup>37</sup> The *First National Maintenance* case involved a partial termination of the business as a result of the company's loss of a contract to provide cleaning services to a nursing home.
- a. Under *First National Maintenance*, the Court recognized three levels of managerial decisions: (1) Decisions that have only an indirect and attenuated impact on the employment relationship over which there is no duty to bargain. Examples given by the Court include advertising and promotion, product type and design, and financial arrangements. (2) Decisions that have a direct and almost exclusive impact on the employment relationship, over which there is a clear obligation to bargain. Examples include the order of layoff and recall, production quotas and work rules. (3) Decisions that have a direct impact on the employment relationship but also focus on the economic profitability of the enterprise. The partial closing in the *First National Maintenance* case was an example of this third category.
  - b. The duty to bargain in cases falling in the third category determined on the basis of a balancing test. There is a duty to bargain over the decision only if it is clear that the benefits derived from bargaining outweigh the employer's need for speed, flexibility and secrecy in the decision-making process. If not, the only duty is to bargain over the effects of the decision.
  - c. In cases following the *First National Maintenance* position, decisions that represent a change in the scope and direction of the business going to a core entrepreneurial concern may

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<sup>35</sup> *General Motors Corp.*, 191 NLRB 951 (1971).

<sup>36</sup> See, e.g., *Sociedad Espanol de Auxilio Mutuo y Benefiencentia De P.R.*, 342 NLRB 458 (2004). A detailed discussion of the variety of results reached by the Board and courts in basic capital decision cases is found in Gacek, S. A. "The Employer's Duty to Bargain on Termination of Unit Work," *Labor Law Journal*, Oct. 1981 at 659-678, and Nov. 1981 at 699-724.

<sup>37</sup> *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

be made unilaterally by the employer without bargaining. However, the duty to bargain still extends to the effects of the decision on the bargaining unit. The employer must give sufficient advance notice to the union to allow meaningful negotiations over the effects.<sup>38</sup>

5. The current Board stand concerning the relocation of collective bargaining work is based on its decision in *Dubuque Packing Co.*<sup>39</sup> *Dubuque* established a three-prong test to determine if a relocation decision is subject to mandatory bargaining.
  - a. The initial burden of proof is on the General Counsel, who must first determine if the relocation of work was “unaccompanied by a basic change in the nature of the employer’s operation.”
  - b. The employer can rebut such a finding, if they can show that the work being done at the new site “varies significantly,” that the work would have been discontinued regardless of the move, or that the “decision involves a change in the scope and direction of the enterprise.”
  - c. The employer may also rebut the finding if they can overwhelming show that labor costs were not a factor in the relocation decision, or that even if labor costs were a factor, any concessions that could have been bargained over would not have been sufficient to deter a move.
6. In a related set of important cases, the Board has also addressed the impact of the collective bargaining agreement on the right of the employer to move bargaining unit work in the middle of the term of a collective bargaining agreement. Two decisions involving the same case illustrate the ability of the Board to engage in dramatic reversals of its interpretation of the law, given a change in the composition of the Board.
  - a. In *Milwaukee Springs I*,<sup>40</sup> the company requested mid-term concessions from the union, claiming that it would move part of the plant unless wage concessions were given. Relying on the zipper clause of the contract, the union refused to negotiate. There was no work preservation language in the contract. The company moved the work.
    - 1) The Board ruled that the employer was prevented from moving the work unilaterally because of the

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<sup>38</sup> *E.g.*, *Vico Products Co.*, 336 NLRB 583 (2001). Compare, *Dorsey Trailers, Inc. v. NLRB*, 233 F.3d 831 (4<sup>th</sup> Cir. 2000)(no duty to bargain), with *Rock-Tenn Co. v. NLRB*, 101 F.3d 1441 (D.C. Cir. 1996)(duty to bargain).

<sup>39</sup> *Food & Commercial Workers Local 150-A (Dubuque Packing Co.)*, 303 NLRB 386 (1991).

<sup>40</sup> *Milwaukee Spring Div., Illinois Coil Spring Co.*, 265 NLRB 206 (1982).

union recognition clause and the absence of a clause giving management the right to relocate the work, and that the union was correct in its refusal to bargain.

- 2) The Board also ruled that the decision was negotiable, as it was motivated by a desire to take advantage of lower labor costs at a different location.
- b. The Board reconsidered its decision in *Milwaukee Springs II*<sup>41</sup> and subsequently ruled that the absence of a work preservation clause left to management the right to make the decision to move unilaterally.
  - c. The effect of the *Milwaukee Springs II* is that contract language that a union attempts to use to prevent movement of work out of a represented facility must be explicit.

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<sup>41</sup> *Milwaukee Spring Div., Illinois Coil Spring Co.*, 268 NLRB 601 (1984).